TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 102.

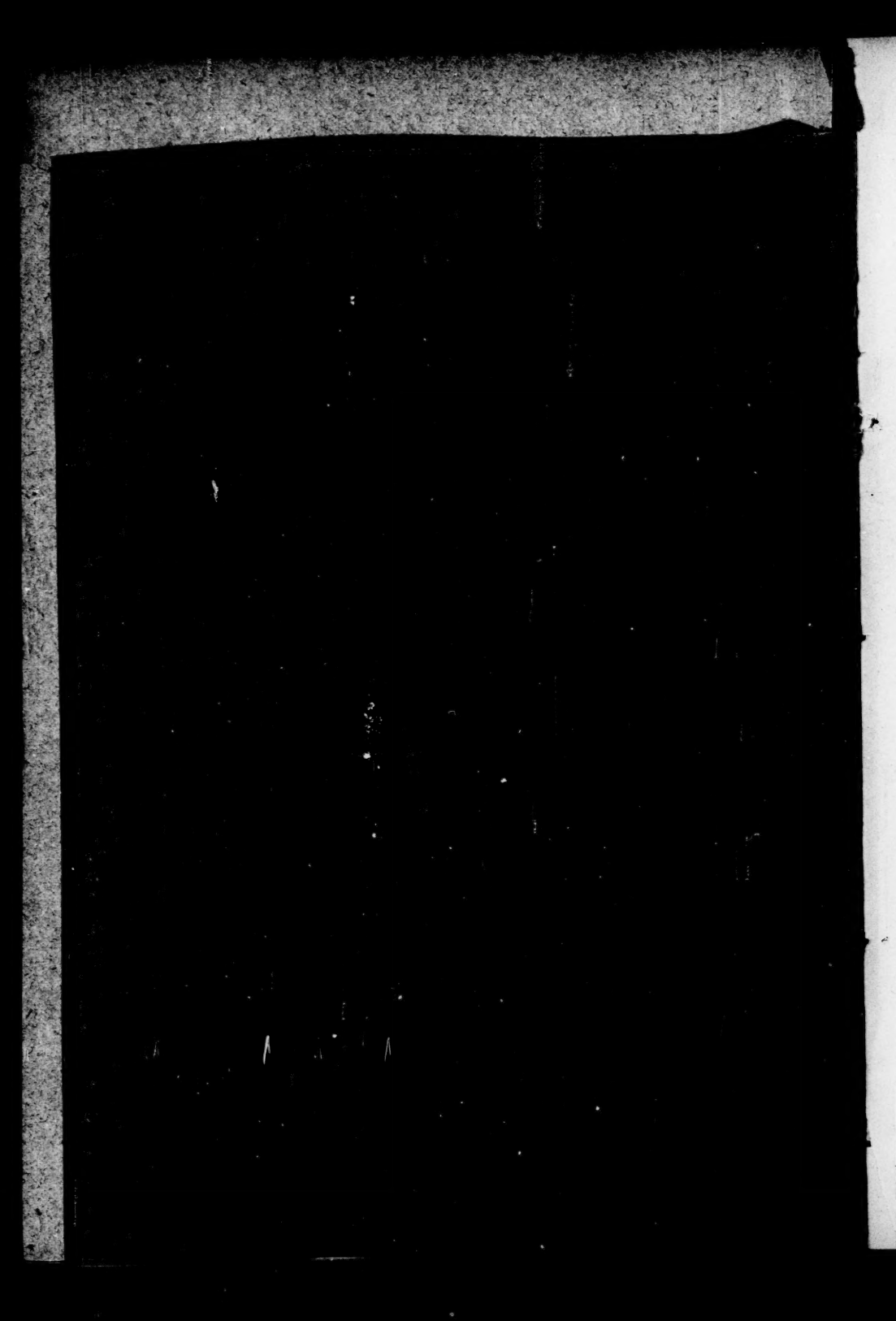
THE UNITED STATES, EX REL. WILLIAM A. JOHNSTON, PLAINTIFF IN ERROR,

vs.

THE COUNTY COURT OF CLARKE COUNTY AND THE JUSTICES THEREOF.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED AUGUST 31, 1875.



SUPREME COURT OF THE UNITED STATES.

No. 102.

THE UNITED STATES, EX REL. WILLIAM A. JOHNSTON, PLAINTIFF IN ERROR,

vs.

THE COUNTY COURT OF CLARKE COUNTY AND THE JUSTICES THEREOF.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

INDEX.

	Original.	Print.
Citation and service	*a*	1
Writ of error	*c*	1
Petition for mandamus	1	2
Order for mandamus	5	4
Amended writ	6	5
Return of county justices	9	6
Return separate of Bartlett	19	9
Demurrer to return	20	10
Order to levy, &c.	21	11
Bill of exceptions	23	12
Writ of error allowed	24	12
Bond	25	13
Certificate	27	13

a The United States of America to the county court of Clark County and the justices thereof, viz, John Langford, Murdock Cooper, George Rauscher, and Hugh A. Stewart, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the 2d Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein The United States, on the relation of William A. Johnston, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Treat, judge of the circuit court of the United States for the eastern district of Missouri, this 17th day of June, in the year of our Lord one thousand eight hundred and seventy-five.

SAMUEL TREAT,
Judge United States Circuit Court, Eastern District of Missouri.

b UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

We, the undersigned, justices of the county court of Clark County, Missouri, hereby acknowledge that we have been duly served with the within citation by the delivery of a copy thereof to each of us respectively, on this the 7th day of July, A. D. 1875.

JOHN LANGFORD,
MURDOCK COOPER,
GEORGE RAUSCHER, &
HUGH A. STEWART.
Justices of the County Court of Clark County,
By SAM'L N. HOLLIDAY,
Their Attorney.

(Indorsed:) United States circuit court, eastern district of Missouri. The United States, ex rel. William A. Johnston, pl'ff in error, vs. The Justices of the County Court of Clark County, Missouri, def'd'ts in error. Citation. Filed , 187 . , clerk.

c UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the March term, 1875, thereof, between the United States, on the relation of William A. Johnston, plaintiff, and the county court of Clark County and the justices thereof, viz, John Langford, Murdock Cooper, George Rauscher, & Hugh A. Stewart, a manifest error hath happened, to the great damage of the said United States, on the relation of William A. Johnston, as by the complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the

said Supreme Court to be then and there held; that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 17th day of June, in the year of our Lord one thousand eight hundred and seventy-five.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the districts of Missouri, dated as aforesaid.

[SEAL.]

M. M. PRICE,
Clerk C. C. U. S., East. District Mo.,
By C. M. WARD,
Deputy.

Allowed by—

SAMUEL TREAT,
Judge.

d UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In obedience to the command of the within writ, I herewith certify to the Supreme Court of the United States a full and complete transcript of the record and proceedings had in the within-named cause, and all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of the circuit court of the United States for said district, at office in the city of St. Louis, this 7th day of July, 1875.

M. M. PRICE,
Clerk,
By C. M. WARD,
Deputy.

(Indorsed:) United States circuit court, districts of Missouri. *vs.* . Writ of error to the district court of the United States for the eastern district of Missouri. Returned and filed, , 187 . , clerk.

1 In the circuit court of the United States for the eastern district of Missouri.

Be it remembered that heretofore, to wit, on the 24th day of September A. D. 1874, and during the session of the September term, 1874, there was filed the following petition for a writ of alternative mandamus:

Petition for writ mandamus.

In the circuit court of the United States for the eastern district of Missouri.

THE UNITED STATES, ON THE RELATION OF William A. Johnson,
v.
THE COUNTY COURT OF CLARK COUNTY AND the justices thereof.
} Information for writ of mandamus.

To the honorable judges of the circuit court of the United States for the eastern district of Missouri:

Now comes William A. Johnson, & gives this court to be informed that he is a citizen of the State of Iowa, & the County of Clark is a municipal

corporation created by and a citizen of the State of Missouri, whose financial affairs are managed by a county court composed of three justices, citizens of the State of Missouri.

That on the sixth (6th) day of June, A. D. 1874, the said William A. Johnson recovered, by the judgment and consideration of this court, of the said county of Clark, the sum of eight thousand and
2 six hundred and six $\frac{64}{100}$ ($8, 606.64) dollars, with interest at seven per cent, (7 %,) and costs taxed at three hundred & ninety-three $\frac{76}{100}$ ($390.76) dollars; that said judgment was recovered on four instalments of interest on one hundred (100) bonds of said county for five hundred dollars ($500) each; that said bonds were executed and delivered by said county on the first day of June, 1871, by order of the county court of said county, under and by authority of the charter of the Missouri & Mississippi Railroad Company; that by section fourteen (14) of said act, the said county court was authorized and empowered to levy a tax of one-twentieth of one per cent. ($\frac{1}{20}$ of 1 %) upon the assessed value of taxable property for each year after the issue of said bonds; that by the laws of the State of Missouri, it is the duty of the county court of Clark County to levy taxes and pay all the indebtedness of said county; that in addition to the said one-twentieth of one per cent. ($\frac{1}{20}$ of 1 %) the said county is authorized to levy a tax of one-half per cent. yearly on the taxable property of the county to pay the debts and expenses of said county; that the valuation of taxable property of said county is not less than three million seven hundred and fifty thousand dollars; that for the year 1874 the said county court has levied a tax for county purposes of only four mills on the dollar; that
3 said county court neglected for the years 1873 & 1874 to levy said one-twentieth of one per cent. ($\frac{1}{20}$ 1 %) or any other sum to pay said interest on said bonds, for which said judgment was recovered; that said twentieth of one per cent. ($\frac{1}{20}$ of 1 %) would not raise over fifteen hundred to two thousand dollars a year, and the whole amount of bonds issued under said order was two hundred thousand, and required a tax amounting to sixteen thousand dollars; that said county court for the year 1874 levied, for county expenses, four mills on the dollar, leaving one mill, which they were authorized to levy, not levied; that a tax of one mill on the dollar of the valuation will not exceed three thousand seven hundred and fifty dollars, and the same is not sufficient with the one-twentieth of one per cent. ($\frac{1}{20}$ of 1 %) to pay said judgment in one year; that execution has issued on said judgment and returned no property found, and a demand has been made on said county court to levy and collect taxes to pay said judgment, and said officers have neglected to make said levy and collect said taxes; that your petitioner is without other adequate remedy at law, and he prays for a writ of mandamus from this court to be directed to the county court of Clark County & the justices thereof, commanding them to levy and collect a tax of twentieth of one per cent. ($\frac{1}{20}$ of 1 %) for the years of
4 1871, 1872, 1873, & 1874, and each following year, and apply a pro rata share thereof *of* on the plaintiff' judgment, and to levy the residue of said five-mill tax for the year 1874 & each succeeding year, & collect said taxes and apply the same yearly on the plaintiff's judgment, until said judgment, interest at the rate of seven per cent., (7 %,) and costs are paid & satisfied in full.

WILLIAM A. JOHNSON,
By GRANT & SMITH, AND
DRYDEN & DRYDEN,
His Att'ys.

STATE OF IOWA,
Scott County, ss:

I, James Grant, being first duly sworn, depose and say that I am one of the attorneys for the plaintiff in the above-entitled cause; that I have read the foregoing, & the facts therein stated are true, as I verily believe.

JAMES GRANT.

Sworn to and subscribed before me & in my presence, by the said James Grant, this 1st day of Sept., A. D. 1874.

[SEAL.] W. M. KAISER,
Notary Public in & for Scott County, Iowa.

And afterwards, at the said term of said court, and on said 24th day of September, 1874, the following appears of record in said cause, to wit:

5 W'M A. JOHNSON, PETITIONER,
vs.
THE COUNTY COURT OF CLARK COUNTY AND the justices thereof, respondents. } Mandamus.

This day comes said petitioner, by John D. S. Dryden, esquire, his attorney, and files a petition for a writ of mandamus against said respondents, requiring them to levy and collect a tax on the taxable property in said county, to satisfy a judgment heretofore rendered against said county and in favor of said petitioner, for the sum of eight thousand six hundred and six dollars and sixty-four cents, with interest, and costs taxed at three hundred ninety-three dollars and *and* seventy-six cents; and said petition having been submitted to the court, on consideration thereof it is ordered that an alternative writ of mandamus, returnable to the next term of this court, be issued, directed to said county court and said justices, commanding them to levy and collect a tax of one-twentieth of one per cent. on the taxable property in said county for the years 1871, 1872, 1873, and 1874, and each following year, and apply a pro rata share thereof on said judgment, and to levy a residue of the five-mill tax mentioned in said petition for the year 1874, and each succeeding year, and collect said taxes and apply the same yearly on said judgment, interest, and costs, until the same are paid and satisfied in full, or show cause why they do not do so.

6 And afterwards, to wit, at the March term, 1875, of said court, and on the 5th day of April, the following appears of record in said cause, to wit:

WILLIAM A. JOHNSON, PETITIONER,
vs.
COUNTY COURT OF CLARK COUNTY, &C., RESPONDENTS. } Mandamus.

This day comes said petitioner, by his attorney, and by consent of respondent's attorney files an amended alternative writ of mandamus herein, to which mandamus the respondents file their return; thereupon said petitioner files his demurrer to said return.

The said amended writ of mandamus is as follows, to wit:

Amended writ.

Circuit court of the United States for the eastern district of Missouri.

THE UNITED STATES, ON THE RELATION OF W'M A. Johnson,
vs.
THE COUNTY COURT OF CLARK COUNTY AND the justices thereof.
} Writ of mandamus.

The President of the United States of America to the county court of Clark County and the justices thereof:

Whereas it has been represented to our circuit court of the United States for the eastern district of Missouri that William A. Johnston, a citizen of the State of Iowa, by the judgment of said circuit court, rendered on the sixth (6th) day of June, A. D. 1874, recovered of the corporation of the County of Clark, a municipal
7 corporation created by and a citizen of the State of Missouri, whose business and financial affairs are managed by a county court, composed of three justices, citizens of said State of Missouri, by due process of law, a judgment for the sum of eight thousand six hundred and six & $\frac{64}{100}$ ($8,606.64) dollars, with interest at seven per cent., (7 %,) and costs taxed at three hundred & ninety-three & $\frac{74}{100}$ ($393.74) dollars; that said judgment was recovered on four instalments of interest on one hundred (100) bonds of said county, for five hundred dollars each; that said bonds were executed and delivered by said county, on the first day of June, 1871, by order of the county court of said county, under and by authority of the charter of the Missouri and Mississippi Railroad Company; that by section thirteen (13) of said act, the said county court was authorized and empowered to levy a tax of one-twentieth of one per cent. ($\frac{1}{20}$ of 1 %) upon the assessed value of taxable property for each year after the issue of said bonds; that by the laws of the State of Missouri it is the duty of the county court of Clark County to levy taxes and pay all the indebtedness of said county; that in addition to the said one-twentieth of one per cent. ($\frac{1}{20}$ of 1 %) the said county is authorized to levy a tax of one-half of one per cent., yearly, on the taxable property of the county, to pay the debts and expenses of said county; that the valuation of taxable property of
8 said property is not less than three million seven hundred & forty thousand dollars; that for the year 1874 the said county court has levied a tax for county purposes of only four mills on the dollar; that said county court neglected for the years of 1872, 1873, & 1874 to levy said one-twentieth of one per cent., ($\frac{1}{20}$ of 1 %,) or any other sum to pay said interest on said bonds, for which said judgment was rendered; that said one-twentieth of one per cent. ($\frac{1}{20}$ of 1 %,) would not raise over fifteen hundred or two thousand dollars a year; and the whole amount of bonds issued under said order was two hundred thousand, and required a tax amounting to sixteen thousand dollars; that said county court for the year 1874 levied for county expenses four mills on the dollar, leaving one mill which they were authorized to levy, not levied; that a tax of one mill on the dollar of the valuation will not exceed three thousand seven hundred and fifty dollars, and the same is not sufficient with the one-twentieth of one per cent. ($\frac{1}{20}$ of 1 %) to pay said judgment in one year; that execution has issued on said judgment and returned no property found, and a demand has been made on said county court to levy and collect taxes to pay said judgment, and said

officers have neglected to make said levy and collect said taxes; that the petitioner is without other adequate remedy at law.

9 Wherefore, you and each of you, the said county court of Clark County and the justices thereof, are hereby commanded to levy and collect a tax of one-twentieth of one per cent. ($\frac{1}{20}$ of 1%) for the years 1872, 1873, & 1874, and each of the following years, and apply a pro rata share thereof on the plaintiff's judgment, and to levy the residue of said five-mill tax for the year 1874, and each succeeding year, and collect said taxes and apply the same yearly on the plaintiff's judgment, until interest at the rate of seven per cent. (7 %), and costs are paid and satisfied in full, or that you appear before our said circuit court at S't Louis, on the 3d Monday of March, A. D. 1875, and show cause why you refuse so to do.

Witness the Hon'l Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and the seal of our said circuit court of the United States for the eastern district of Missouri, and the signature of the clerk thereof, this 18th day of November, A. D. 1874.

[SEAL.] AUSTIN DRAK, *Clerk*,
By H. C. GEISBERG, *D. C.*

And the said returns to said amended writ are as follows, to wit:

Return.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the circuit court of the United States within & for the eastern district of Missouri.

W'M A. JOHNSTON, PL'FF,
10 *vs.*
THE COUNTY OF CLARK, DEFENDANT.

To the honorable the circuit court of the United States, within & for the eastern district of Missouri:

And now come John Longford, Murdock Cooper, George Rouscher, and Hugh A. Stewart, judges of the county court of Clark County, in the State of Missouri, and for return to the amended alternative writ of mandamus, heretofore issued in this cause, and dated the 18th day of November, A. D. 1874, on the petition of W'm A. Johnston, say: that the plaintiff ought not to have his said writ of peremptory mandamus, because these defendants say, that in the year 1872 the said county of Clark adopted what is termed in the laws of Missouri as "Township organization," and said county of Clark from that time has been, and still is, governed by the laws of the State of Missouri pertaining to township organization; that these defendants, except as to one who was elected in 1874. were all elected to their said offices of justices of the county court of Clark County in the summer of 1873; that the county court of Clark County, on the 3d day of May, 1871, wrongfully, fraudulently, and corruptly, and against the wishes of the people of Clark County, subscribed for two thousand shares, of one hundred dollars each, of the capital stock of the Missouri and Mississippi
11 Railroad Company, and said county court, then and there, to wit, on the 3d day of May, 1871, issued two hundred thousand dollars in bonds of said Clark County to pay for said stock, and placed said bonds in the hands of an agent, to be paid over to said Missouri and Mississippi Railroad Company, from time to time, as the work of said railroad progressed in said county, and only in payment for work done; that the

people of said county of Clark, immediately after the said action by its county court, took all the steps known to the law to revoke the power of the said agent, and to restrain him from delivering said bonds to said railroad company, and to restrain him from disposing of the same; that, notwithstanding all the efforts made by the people of said Clark County, all of said two hundred thousand dollars in bonds were disposed wrongfully and fraudulently by said agent, and the same are now, and all the interest coupons thereon, unpaid, as these defendants have been informed and believe; that one Waterman and Beaver, on the 6th day of June, 1874, obtained a judgment against said Clark County, in this court, for the sum of four thousand one hundred and twenty-four dollars & costs, and the causes of action on which said judgment was rendered were certain coupons representing the interest on a part of said two hundred thousand dollars in bonds so issued as aforesaid by
12 the county court of Clark County, to the said Missouri and Mississippi Railroad Company. These defendants deny that said $200,000 in bonds or any part of them were delivered on the first day of June, 1871, and aver that none of the same were delivered before January, 1874, or disposed before that time; that all of said two hundred thousand dollars in bonds bear eight per cent. interest per annum; that the said county court of Clark County had no authority to subscribe for said two thousand shares of the capital stock of the said Missouri and Mississippi Railroad Company, nor to issue bonds therefor, nor to levy a tax to pay the same, except in so far as such power was conferred by the thirteenth section of an act passed by the general assembly of the State of Missouri, entitled "An act to incorporate the Missouri and Mississippi Railroad Company," and approved February 20, 1865; that it was provided in and by the 13th section of said act that it should be lawful for the corporate authorities of any city or town, or the county court of any county desiring so to do, to subscribe to the capital stock of said Missouri and Mississippi Railroad Company, and to issue bonds therefor, and levy a tax to pay the same not to exceed one-twentieth of one per cent. upon the assessed value of the taxable property for each year; that these defendants, knowing that said bonds had been fraudulently issued and disposed of, and believing that
13 the holders of the same took the same with notice of such fraud, they, as such county court, for the year 1874, and their immediate predecessors in office, for the year 1873, failed to levy said one-twentieth of one per cent. tax to pay said bonds or the interest-coupons thereon; that the taxes of 1873 had already been levied when these defendants were elected to office as said county judges; that the judgment obtained by the plaintiff against said county of Clark mentioned and described in the alternative writ to which this return is made, was obtained in this court on the 6 day of June, 1874, for the sum of eight thousand six hundred and six dollars and sixty-four cents, and costs, and the causes of action on which said judgment was rendered were certain coupons representing the interest on a part of said two hundred thousand dollars in bonds so issued as aforesaid by the county court of Clark County to the said Missouri and Mississippi Railroad Company; that these defendants have not levied said tax of one-twentieth of one per cent. to pay the judgment of said plaintiff since said judgment was rendered, because they had no power so to do; that it is provided by the laws of Missouri that the county courts of counties organized under the township-organization acts shall hold four sessions each year, commencing respectively on the third Mondays of January, April, July, and November; and it is further provided, that at the April term of said

court the county court shall examine the assessment-rolls of the
14 several townships in their county, for the purpose of equalizing the valuation in the several townships, and also correct the several lists, if necessary, and at said term fix a certain rate to be levied upon the hundred dollars of taxable property, personal and real, in their respective counties, for county purposes, and for township purposes; that the county clerk shall immediately thereafter, immediately after said April term of said county court, cause the taxes to be extended on a fair copy of the assessment lists, and as soon as the same shall have been extended the said county clerk is required to make out annually, and only annually, for the use of the township collector, correct duplicate tax-bills, side by side, in a well-bound book, of all taxes on all property assessed in the townships; that the defendants, as a county court, have no authority or power to collect any tax, general or special, except from, through, and by the assessments and tax-bills made out annually by the county clerk as aforesaid; that the only time provided by law for levying taxes, general and special, in Clark County, for the years 1871, 1872, 1873, and 1874, was in the summer of each of said respective years, at certain meetings of said county court, as provided by law; that the only time provided by law for making said levy for the year 1874 was at the April term of said court, beginning on the third Monday of April; and the only time for levying taxes in said
15 Clark County, both general and special, as provided by law, is at said April term, 1875, beginning on the 3d Monday of April; that the time has passed in which these defendants, as the county court of Clark County, have any authority to make said levy of said special tax of one-twentieth of one per cent. for said years of 1871, 1872, 1873, and 1874, or to levy any portion of the county tax for the year 1874, authorized to be levied by the laws of this State; that these defendants as said county court have no authority to levy said special tax of one-twentieth of one per cent. for more than one year at one and the same time, or during or for more than one and the same year; and defendants deny that the county court was authorized or empowered to levy said tax for each year after the issue of said bonds; that said county court had no authority to levy said tax until said bonds were disposed of by said county.

These defendants deny that the said county of Clark is or ever was authorized to levy a tax of one-half (½) per cent. (%) yearly on all the taxable property of said county to pay its debts and expenses; that, on the contrary, the said county, by its county court, was for the year 1874 empowered to levy such sums as might be necessary to defray the expenses of said county, by a tax upon all property and licenses made taxable by law for State purposes, except certain exempted prop-
16 erty, but the county tax should in no case exceed one-half of one per cent. on all taxable property; and these defendants deny that the county court of Clark County failed to levy one-half per cent. on the taxable property of said county for the year 1874 to pay the expenses of said county; that for the year 1874 the following rates of tax were levied on all the taxable property in said county of Clark, to wit:

State revenue,	20c. on	each $100.00	valuation.
" int.,	25c. "	" "	"
County revenue,	40c. "	" "	"
" poor,	10c. "	" "	"
" bridge,	05c. "	" "	"
For int. on M. I. & N. R. R. bonds,	10c.	" "	"
" " A. & B. R. R.	40c.	" "	"

That said county tax of one-half per cent. for the year 1874 was fully levied and collected and has been paid out in paying the expenses of the said Clark County; that the only time provided by law for levying said county tax of one-half of one per cent. for the year 1874 was at the meeting of the county court of said county held on the third Monday of April, 1874, and that these defendants have no authority to levy any portion or residue of county taxes for the year 1874 during the year 1875; that it is not the duty of the county court of Clark County to levy taxes and pay all the indebtedness of said county by the laws of the State of Missouri; that the county court of Clark County
17 has no authority to levy taxes for county purposes except to the extent of one-half of one per cent. on the taxable property of said county for the purpose of paying the expenses of said county, and all that said tax can produce is necessary to pay the current expenses of said Clark County, and have no authority to levy said county taxes to pay the judgment of pl'fft; and these defendants say that they have no authority or power to make any other order or provision than that said special tax of one-twentieth of one per cent. on all the taxable property of Clark County, when collected, shall be applied pro rata to the payment of all the interest coupons on said two hundred thousand dollars in bonds, including the said judgment of plaintiff, W'm A. Johnston.

These defendants deny that a demand has been made on said county court to levy and collect taxes to pay plaintiff's judgment, & defendants deny that they have neglected to levy said taxes; these defendants, as said county court, say they intend, and have always intended, since the said judgment in favor of the plaintiff was rendered against Clark County, to levy a tax of one-twentieth of one per cent. on the taxable property of said county at the April term, 1875, of the county court of said county, and apply the proceeds thereof, when collected, to the payment pro rata of the judgment in favor of said plaintiff, and the inter-
coupons of the remainder of said two hundred thousand dollars
18 in bonds, issued as aforesaid to said Missouri and Mississippi Railroad Company; and these defendants, as the county court of Clark County, state in this their return to the alternative writ issued in this cause, they will annually, beginning at their April term, 1875, of said court, levy said special tax of one-twentieth of one per cent. on all the taxable property of Clark County, and apply the proceeds, when collected, to the payment pro rata of the judgment of the plaintiff, and the judgment in favor of Waterman and Beaver aforesaid, and the interest-coupons on the other portion of said two hundred thousand dollars of bonds issued and delivered to the said Missouri and Mississippi Railroad Company in payment of said subscription for two thousand shares of the capital stock of said railroad company; and these defendants further state, that the said coupons on which the plaintiff obtained judgment were not disposed of by the aforesaid agent of the county of Clark until after the third Monday of April, 1873, and until the year 1874, as these defendants have been informed and believe, and that the same belonged to the county of Clark until January, 1874.

Wherefore these defendants pray that said peremptory writ of mandamus may be denied & these defendants discharged with their costs.

SAM'L N. HALLIDAY.

19 *Attorney for defendants making this return.*

And at the same time last aforesaid Fielding N. Bartlett makes the following separate return to said amended writ:

Separate return.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the circuit court of the United States within and for the eastern district of Missouri.

WILLIAM A. JOHNSTON, PLAINTIFF,
against
THE COUNTY OF CLARK, DEFENDANT.

To the honorable the circuit court of the United States within and for the eastern district of Missouri:

And now comes Fielding N. Bartlett, one of the former judges of Clark County, and for return for the alternative writ of mandamus heretofore issued, and dated the 18th day of November, 1874, on the petition of William A. Johnston, says that the plaintiff ought not to have his said writ of peremptory mandamus, so far as this defendant is concerned, because, on the 2d day of March, 1875, this defendant, contemplating and intending immediately to remove from the county of Clark, and take his permanent residence in the county of Saint Louis, resigned his said office of judge of said county of Clark, and is no longer one of the judges thereof. Wherefore this defendant prays that said premptory writ of mandamus may be denied, and this defendant discharged with costs.

* * * *

STATE OF MISSOURI,
County of Clark, ss:

Fielding N. Bartlett, being duly sworn, upon his oath states, that the foregoing return and the matters and things therein stated are true, according to the best of his knowledge and belief.

F. N. BARTLETT.

Sworn to and subscribed before me this 19th day of March, 1875.
[SEAL.] OTHO CALLIHAN,
Notary Public.

And the said demurrer to the return of amended alternative writ is as follows, to wit:

Demurrer to return.

In U. S. cir't court, east. dis't Mo., Mar. term, '75.

UNITED STATES, EX REL. W'M A. JOHNston, pl'ff,
vs.
COUNTY COURT OF CLARK COUNTY & THE justices thereof, defendants.

Now comes the relator, W'm A. Johnston, by Dryden & Dryden, & Grant & Smith, his attorneys, and demurs to the return of George A. Rouscher, Hugh A. Stewart, and others, justices of the said county

21 court of Clark, to the amended alternative writ herein, and says the same is not sufficient in law to show cause why a peremptory writ of mandamus should not issue against them, or to be pleaded to by said relator, and this he is ready to verify; and said relator, for the grounds of his demurrer, says:

1. That said return does not state facts sufficient to constitute any excuse for disobedience of the said alternative writ, or to show why said alternative writ ought not to have been issued, or to show obedience of said writ.

2. That several separate and distinct answers or defences to the allegations of the said amended writ are confusedly joined in one count of the return and not set forth distinctly, separately, and intelligibly in separate counts.

3. That said return contains several inconsistent defences, some by way of traverse and some by way of confession and avoidance of the allegations of the writ.

GRANT & SMITH,
DRYDEN & DRYDEN,
For Relator.

And afterwards, at said March term, 1875, of said court, and on the 18th day of April, 1875, the following appears of record in said cause, to wit:

22 WILLIAM A. JOHNSTON, PLAINTIFF,
vs.
COUNTY COURT OF CLARK CO., &C., DEFENDANTS. } Mandamus.

The court having considered the demurrer to the return of said defendants to the amended alternative writ of mandamus herein, and being fully advised in the premises, it is ordered that said demurrer be overruled; thereupon the case is dismissed as to the defendant, Fielding A. Bartlett. And it is further ordered, that a peremptory writ of mandamus be issued against the county court of Clark County and the justices thereof, commanding them to cause a tax-levy to be made for the year 1873, on the assessment of that year, to the extent of $\frac{1}{20}$ of one per cent., and for the year 1875, on the assessment for the latter year at the same rate, viz, $\frac{1}{20}$ of one per cent.; the proceeds thereof to be applied pro rata to the amount of the judgments in this case, and in other cases, on coupons of bonds of the same issue, and also to the interest on the other bonds of the same issue; and that the respondents cause to be levied from year to year the same per cent. on assessed values until the pro rata portion thereof applicable to the judgment, interest, and costs in this case is paid; the said cause having been submitted on the amended writ and return.

23 And afterwards, at said March term, 1875, and on the 30th day of April, 1875, the relator filed the following bill of exceptions, to wit:

Bill of exceptions.

In the circuit court of the United States for the eastern district of Missouri, March term, 1875.

THE UNITED STATES, ON THE RELATION OF William A. Johnston,
vs.
THE COUNTY COURT OF CLARK COUNTY and the justices thereof.

Be it remembered that at this term of this court, this cause coming on to be heard upon the alternative writ of mandamus and returns thereto, and thereupon the court refused to order a peremptory mandamus requiring the respondents to levy and collect a tax of one-twentieth of one per cent., as prayed by the relator, for the years 1872 and 1873, but ordered such tax for the years 1874 and 1875 only, and also wholly refused to order the levy of the taxes prayed by the relator in excess of $\frac{1}{20}$ of one per cent., to which decision and opinion of the court in refusing to levy the said several taxes prayed by the relator, the plaintiff, by its counsel, at the time duly excepted, and the plaintiff presents this, its bill of exceptions, to the court, and prays that the same may be signed and sealed and made a part of the record, which is accordingly done.

24 SAMUEL TREAT. [SEAL.]

And afterwards, to wit, on the 18th day of June, 1875, it being an adjourned day of said court, the following proceedings were had in said cause, to wit:

Writ of error allowed.

THE U. S., EX REL. W'M A. JOHNSTON, relator,
vs.
CLARK COUNTY COURT, &C., RESPONDENTS.

This day comes the relator by Messrs. Dryden & Dryden, attorneys, and presents to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation directed to said respondents citing and admonishing them to appear at the next term of said Supreme Court, and thereupon said writ of error is allowed and the said citation signed by the judge. And the said relator also presents a bond in the sum of five hundred dollars, which is approved by the court and ordered to be filed.

Which said bond is as followss, to wit:

Bond.

Know all men by these presents that we, W. M. Kaiser and L. M. Fisher, of the county of Scott, & State of Iowa, are held and firmly bound unto the county court of Clark County, and the justices thereof, John Langford, Murdock Cooper, George Rauscher, and Hugh A. Stewart, in the full and just sum of five hundred dollars, to be paid to
25 the said county court, John Langford, Murdock Cooper, George Rauscher, and Hugh A. Stewart, their heirs, executors, adminis-

trators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 18th day of June, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas, lately, at the March, 1875, term of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between the United States, on the relation of William A. Johnston, plaintiff, and the County Court of Clark County, and the justices thereof, said Langford, Murdock Cooper, Rauscher, & Stewart, defendants, judgment was rendered against the said plaintiff in error, and the said plaintiff in error having obtained a writ of error of the the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said county court of Clark County and the justices thereof, said John Langford, Murdock Cooper, George Rauscher, & Hugh A. Stewart, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such, that if the said plaintiff, The United States, on the relation of William A. Johns-
26 ton, shall prosecute said writ to effect, and answer all damages and costs if it fail to make good its said plea, then the above obligation to be void, else to remain in full force and virtue.

W. M. KAISER. [SEAL.]
L. M. FISHER. [SEAL.]

Approved by—

SAMUEL TREAT.

27 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

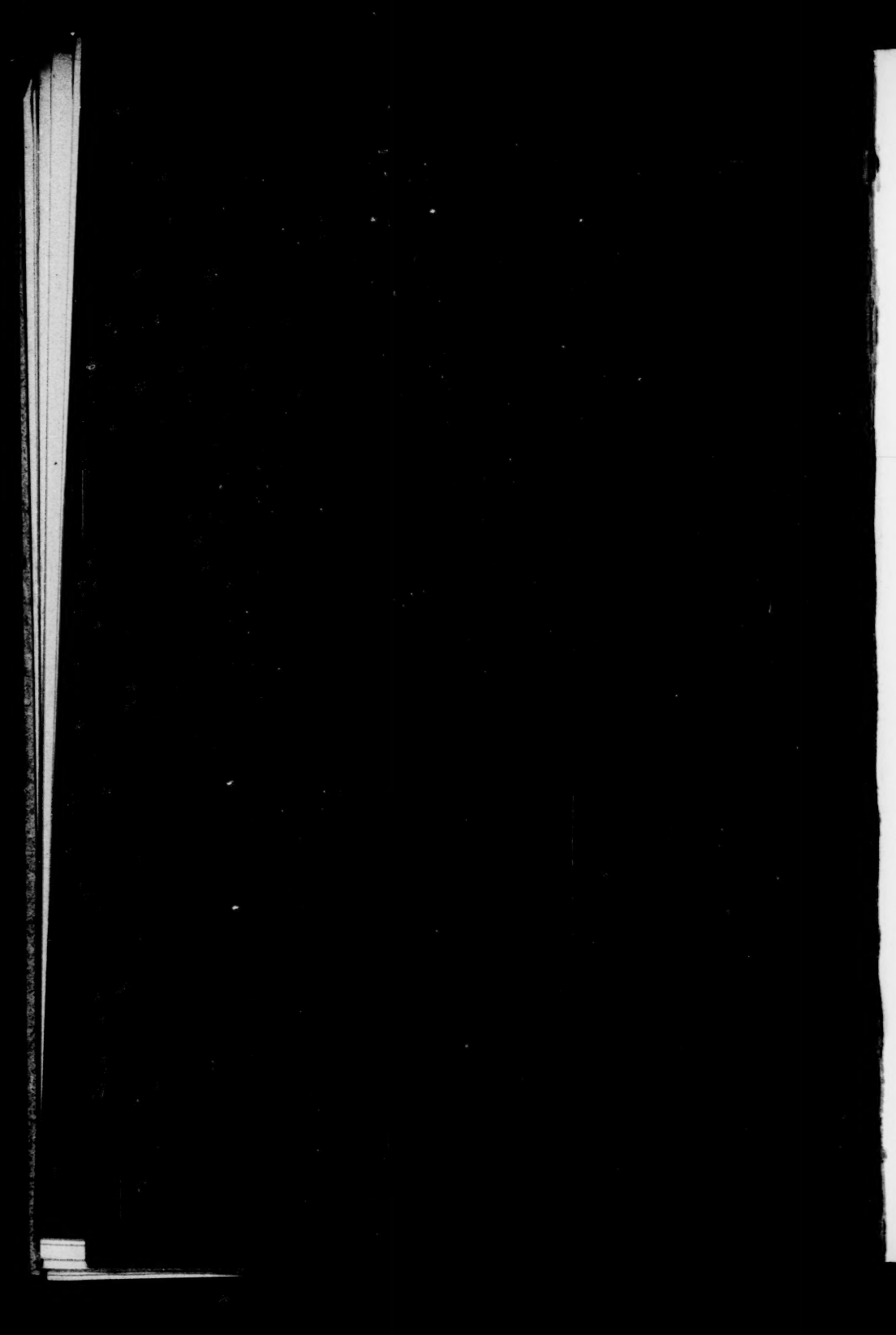
I, M. M. Price, clerk of the circuit of the United States, in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true copy of the record and proceedings had in case No. , of The United States, ex rel. W'm A. Johnston, plaintiff, against The County of Clark and the justices thereof, defendants, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this seventh day of July, in the year of our Lord eighteen hundred and seventy-five.

[SEAL.]

M. M. PRICE,
Clerk of said Court.
By C. M. WARD,
Deputy.

(Indorsement on cover:) No. 102. The United States, ex rel. William A. Johnston, plaintiff in error, vs. The County Court of Clark County and the justices thereof. E. Missouri C. C. U. S. Filed 31st August, 1875.



SUPREME COURT OF THE UNITED STATES.

No. 102.

U. S., *ex rel*, WM. A. JOHNSTON,
Plaintiff in Error.
vs.
THE COUNTY OF CLARK AND THE JUSTICES THEREOF,
Defendants in Error.

Now comes the plaintiff in error and says that the said Circuit Court erred in overruling the demurrer to the return to the alternative writ of madamus, for the causes set forth in said demurrer. (See pages 10 and 11 of the Record).

J. & W. M. Grant, for Plaintiffs in Error.

U. S., *ex rel*, W. A. JOHNSTON,
Plaintiff in Error.
vs.
THE COUNTY OF CLARK AND THE JUSTICES THEREOF,
Defendants in Error.
SUPREME COURT.

STATEMENT OF THE CASE.

William A. Johnston recovered on the 6th of June, 1874, a judgment against Clark county for the sum of $8,606.64, being four instalments of interest on one hundred bonds, of $500 each, issued by the county on June 1st, 1871, by order of the County

Court, under the authority of the charter of the Missouri and Mississippi Railroad Company.

This charter was enacted on the 20th of February, 1865, before the adoption of the new constitution, and is found in the "Acts" of the Missouri Legislature, for 1865, page 86; and section 13 of that act, page 88, provided:

"It shall be lawful for the corporate authorities of any city, or town, the County Court of any county, desiring to do so, to subscribe to the capital stock of said company, and may issue bonds therefor and levy a tax, to pay the same, not to exceed one twentieth of one per cent. upon the assessed value of the taxable property, for each year."

The alternative writs, following the information, page 5 of the Record, sets out that by this action the Couuty Court was authorized to levy said one twentieth of one per cent. for each year after the issue of the bonds, in June 1871, and also a tax not exceeding five mills under the general laws of the State of Missouri, for each year, to defray the expense of the county. (See 2d Wagner's Statutes, page 1,193, sec. 165.)

That the valuation of the property of the county is not less than $3,740,000. That for 1874, the county levied a tax of only four mills on the dollar. That for the years 1872, 1873, and 1874, the County Court neglected to levy the tax of one twentieth of one per cent., or any other sum, to pay the interest on said bonds. That said one twentieth would not raise over $1,500 or $2,000 a year. That the whole amount of said bonds, issued under said order, was $200,000, and required a tax of $16,000 a year to pay the interest. That for 1874, the County Court levied for county expenses only four mills on the dollar, leaving one mill not levied. That a tax of one mill would not exceed $3,750, and with one twentieth of one per cent. is not sufficient to pay said judgment.

That execution has been issued on said judgment and returned no property found, and a demand has been made on said County Court to levy and collect taxes to pay said judgment; and the County Court has neglected so to do, and the petitioner is without other adequate remedy at law, and the alternative

writ ordered the County Court to levy the tax of one twentieth of one per cent. for 1872, 1873, and 1874, and each following year, to pay said judgment; and to levy the remainder of the five mill tax for 1874, and each succeeding years, and apply the same on the plaintiff's judgment, until paid.

RETURN OF THE DEFENDANT'S.

The return (see page 6 of Record) set up, fraud in the issue of the bonds, which we need not notice, except to recite: "that on June 6, 1874, on same date as plaintiff's judgment, Water & Beaver received $4,124," on similar bonds for interest; that the bonds were not issued until January, 1874, contradicting the judgment in favor of Johnston, which was for four instalments of interest, and says that the County Court can only levy taxes at fixed dates.

Admits the failure to levy the tax of one twentieth of one per cent., for 1872, 1873, and 1874, and denies the power to levy. Says the time for levying taxes is past for 1872, '73, '74, and '75; that the only time for levying taxes is at the April session in each year. Asks no authority to levy, except in the way named in the law; admits a levy of only forty cents four mills for county revenue, and sets up the levy of other special taxes as for the poor, bridges, certain other matured bonds, etc. Endeavors to make out the tax of one-half per cent. was levied for 1874, by adding the poor tax to the county revenue tax; denies a demand to levy the tax, but admits the issue of execution and return of no property found; proposes to levy one twentieth of one per cent. in April, 1875, which ought to have been levied in April, 1874.

The plaintiff in error demurred to this return:

1. Because it set up no reason why the alternative was not obeyed.

2. That the return set up several separate and distinct answers, in one confused and joint count, and did not set them forth distinctly.

3. That the several defences were incorrect. (Record, page 11.)

The Court (Record, page 11) overruled the demurrer; refused the mandamus to levy one twentieth of one per cent. for the

years 1872, '73, '74, and to levy the one mill under the general law; and ordered a peremptory writ only for one twentieth of one per cent., for the year 1875, to be divided *pro rata* among all the holders of the bonds.

The plaintiff excepted to this order, and hence this writ of error.

ARGUMENT.

We waive all technical objections to the returns.

The defendant could not set up in bar of the writ that the bonds were fraudulently issued, or not issued until January, 1874. The plaintiff's judgment rendered in June, 1874, for four prior instalments of interest is conclusive upon that point, and cannot be disputed on this application, nor can it be impeached upon a pretence of a fraudulent issue of the bonds. On both these points the question was open to the defendant, before judgment, not afterwards, on an application to execute the judgment.

We say the Court erred in both points:

1st. The plaintiff was entitled to have the one twentieth of one per cent., levied in each year after the issue of the bonds, unless his interest was otherwise paid. The argument is made in the answer, that the defendant had neglected to levy the taxes for those years. So far from being an excuse for the opposition to the writ, is conclusive in favor of its issue. It was because the tax was not levied at the time required by law, that gave occasion for the mandamus; for if the tax of one twentieth had been levied and paid, the plaintiff would have had no cause for the writ.

It is true, that the defendant, admitting the execution and return of *nolle bona*, denies a demand and refusal.

When the law imposes a public duty and it is neglected, no demand to perform it is necessary, and certainly a writ of execution returned *nolle bona* is equivalent to a demand, if one had been required.

2. The second point to which we wish to allude is the refusal of the Court to allow the writ for the one mill tax, part of the

five mills authorized by the general law, to pay the expenses of counties.

Unquestionally the Court refused the writ for this tax, on the ground that the charter of the road, passed in 1865, authorized a tax of one twentieth of one per cent., to pay said debt, and therefore the plaintiff was limited to that tax alone.

We do not think this is the law. That special tax was a cumulative remedy, and in the case of this road was intended as a sinking fund tax.

But there are other laws of the State enlarging and enforcing this obligation to railroad companies.

In the General Statutes (see 1st Wagner, page 306, Section 21; Edition of 1872): "any County Court which has heretofore subscribed to the stock of any railroad in this State, shall be entitled to the privileges and subject to the liabilities of other stockholders in such company, and the County Court, City, or Town Council shall have all the rights and power to provide funds to pay such subscriptions as are granted to County Courts and cities by this chapter, and may levy a special tax to pay the interest on their bonds, or to provide a sinking fund to pay the principal."

Section 18, of the same law, (page 305 Wagner's) authorizes the issue of bonds, or levy of special taxes.

The Act of March 24, 1870, in section 22 of the same page of Wagner, Edition of 1872, authorized a mandamus to County Courts, refusing to levy this tax.

In March, 1872, (see Acts March 10, 1872, section 52, quoted in Wagner, page 313,) provided, in order to meet payment on the part of such subscriptions and to pay interest on principal of bonds, the County Court should from time to time, levy a special tax, to be levied on all the property of the county, provided, that no county, city, town, or township, shall ever subscribe in the aggregate a sum exceeding ten per cent. of the last assessment within the *county*, city or township.

This law of 1871, perhaps, related to a law authorising townships to subscribe, but the act is general in its nature, and

was intended to validate and protect all *county* subscriptions which did not exceed ten per cent. of the county valuation.

We know it will be said that the general statutes of Missouri were passed in 1865, the section 21, on page 306, of Wagner will be thought to be limited to subscriptions before that date.

But we think not: the Act of March 30, 1872, in preface to Edition of Wagner, 1872, provides for a revision of the Statutes, and says, that said revision when approved shall be *prima facie* evidence of the laws of this State in all Courts of Justice and elsewhere, from and after such approval, which approval is dated July 5, 1872.

The word "heretofore," in section 1, article 2, chapter 86, (Wagner p, 887,) refers to "time previous to the day when such Statute shall take effect."

And we see by the Act of 1871, March 10, page 313, of Wagner, that it was the intention of the Legislature to provide for the payment of interest due on rail road bonds, when the debt did not exceed ten per cent. of the valuation.

It is true, that the Supreme Court of Missouri in State vs. Shortridge (56 Missouri, 126,) construe the special Act of 1865, to limit the power of taxation to one twentieth of one per cent., but that was to pay the principal debt, and made no provision for the interest. The Court pays no attention to the subsequent Acts of 1871, and with due deference to the opinion, there was no question made before it, but question of power to tax, because the special Act limited the power.

The whole history of the Statutes of Missouri, up to the date of the recent repudiation, shows a continued determination to give credit to these railroad bonds, and to assure purchasers that they would be paid.

It is also true, that this Court pays great deference to the decisions of the Supreme Court of a State, upon any State law, but this interpretation was made after the passage of the various laws on which we rely, and not before.

We further insist, that section 6th, of article 9, of the new Constitution of Missouri, puts the interpretation which we now do, on the General Statutes of Wagner.

That section after totally prohibiting any such subscriptions to railroads thereafter, has thus provided: "Provided that nothing in this constitution contained, shall affect the right of any such municipality to make such subscriptions, when authorized by a vote under existing laws, prior to its adoption, or to prevent the issue of renewal bonds, or the use of such other means as *are* or may be prescribed by law for the liquidation or payment of such subscriptions, or of *any existing indebtedness*."

We think that the Court had full authority under existing laws, to compel the levy of the tax under the general revenue law, not needed for county expenses, and to apply the same on the interest of this bond debt.

J. & W. M. GRANT,

for Defendant in Error.

IN THE

Supreme Court of the United States

NO. 102.

THE UNITED STATES Ex Rel,
WILLIAM A. JOHNSTON,
Plaintiff in Error.

AGAINST

THE COUNTY COURT OF CLARK COUNTY AND THE JUSTICES THEREOF. *Defendants in Error.*

ERROR FROM CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT AND BRIEF FOR THE COUNTY,

—BY—

McCRARY, HAGERMAN & McCRARY,
ATTORNEYS.

STATEMENT.

This is a mandamus proceeding, commenced July 7th, 1875, against the Justices of the County Court of Clark County, Missouri.

The case was submitted to the Court below without proofs, on the amended alternative writ of mandamus and the return thereto.

We cannot agree to the statement made by the counsel for plaintiff in error. We deem the amended alternative writ and the return thereto sufficiently concise, omitting the mere formal parts, to be set out here.

AMENDED WRIT.

"Whereas it has been represented to our Circuit Court of the United States for the Eastern District of Missouri that William A. Johnston, a citizen of the State of Iowa, by the judgment of said Circuit Court, rendered on the sixth (6th) day of June, A. D. 1874, recovered of the corporation of the County of Clark, a municipal corporation created by and a citi-
7 zen of the State of Missouri, whose business and financial affairs are managed by a County Court, composed of three justices, citizens of said State of Missouri, by due process of law, a judgment for the sum of eight thousand six hundred and six and 64-100 ($8,606.64) dollars, with interest at seven per cent., (7 per cent) and costs taxed at three hundred and ninety-three and 74-100 ($393.74) dollars; that said judgment was recovered on four installments of interest on one hundred (100) bonds of said county, for five hundred dollars each; that said bonds were executed and delivered by said county, on the first day of June, 1871, by order of the County Court of said county, under and by authortty of the charter of the Missouri

and Mississippi Railroad Company; that by section thirteen (13) of said act, the said County Court was authorized and empowered to levy a tax of one-twentieth of one per cent. (1-20 of 1 per cent.) upon the assessed value of taxable property for each year after the issue of said bonds; that by the laws of the State of Missouri it is the duty of the County Court of Clark County to levy taxes and pay all the indebtedness of said county; that in addition to the said one-twentieth of one per cent. (1-20 of 1 per cent.) the said county is authorized to levy a tax of one-half of one per cent., yearly, on the taxable property of the county, to pay the debts and expenses of said county; that the valuation of taxable property of said
8 county is not less than three million seven hundred and forty thousand dollars; that for the year 1874 the said County Court has levied a tax for county purposes of only four mills on the dollar; that said County Court neglected for the years 1872, 1873 and 1874 to levy said one-twentieth of one per cent. (1-20 of 1 per cent.) or any other sum to pay said interest on said bonds, for which said judgment was rendered; that said one-twentieth of one per cent. (1-20 of 1 per cent.) would not raise over fifteen hundred or two thousand dollars a year; and the whole amount of bonds issued under said order was two hundred thousand and required a tax amounting to sixteen thousand dollars; that said County Court for the year 1874 levied for county expenses four mills on the dollar, leaving one mill which they are authorized to levy, not levied; that a tax of one mill on the dollar of the valuation will not exceed three thousand seven hundred and fifty dollars, and the same is not sufficient with the one-twentieth of one per cent. (1-20 of 1 per cent.) to pay said judgment in one year; that execution has issued on said judgment and returned no property found, and a demand has been made on said County Court to levy and collect taxes to pay said judgment, and said officers have neglected to make said levy and collect said taxes; that the petitioner is without other adequate remedy at law.

"Wherefore, you and each of you, the said County Court of

Clark County and the justices thereof, are hereby commanded to levy and collect a tax of one-twentieth of one per cent. (1-20 of 1 per cent.) for the years 1872, 1873 and 1874, and each of the following years, and apply a pro rata share thereof on the plaintiff's judgment, and to levy the residue of said five-mill tax for the year 1874, and each succeeding year, and collect said taxes and apply the same yearly on the plaintiff's judgment, until interest at the rate of seven per cent. (7 per cent.) and costs are paid and satisfied in full, or that you appear before our said Circuit Court at St. Louis, on the 3d Monday of March, A. D. 1875, and show cause why you refuse so to do."

RETURN.

"And now come John Longford, Murdock Cooper, George Rauscher and Hugh A. Stewart, judges of the County Court of Clark County, in the State of Missouri, and for return to the amended alternative writ of mandamus, heretofore issued in this cause, and dated the 18th day of November, A. D. 1874, on the petition of Wm. A. Johnston, say: that the plaintiff ought not to have his said writ of peremptory mandamus, because these defendants say, that in the year 1872 the said county of Clark adopted what is termed in the laws of Missouri as "Township Organization," and said County of Clark from that time has been, and still is, governed by the laws of the State of Missouri pertaining to Township Organization; that these defendants, except as to one who was elected in 1874, were all elected to their said offices of justices of the County Court of Clark County in the summer of 1873; that the county court of Clark County, on the 3d day of May, 1871, wrongfully, fraudulently and corruptly, and against the wishes of the people of Clark County, subscribed for two thousand shares, of one hundred dollars each, of the capital stock of the Missouri and
11 Mississippi Railroad Company, and said County Court, then and there, to-wit, on the 3d day of May, 1871, issued two hundred thousand dollars in bonds of said Clark County to pay for said stock, and placed said bonds in the hands

of an agent, to be paid over to said Missouri and Mississippi Railroad Company from time to time, as the work of said railroad progressed in said county, and only in payment for work done; that the people of said county of Clark, immediately after the said action by its County Court, took all the steps known to the law to revoke the power of the said agent, and to restrain him from delivering said bonds to said railroad company, and to restrain him from disposing of the same; that, notwithstanding all the efforts made by the people of said Clark County, all of said two hundred thousand dollars in bonds were disposed wrongfully and fraudulently by said agent, and the same are now, and all the interest coupons thereon, unpaid, as these defendants have been informed and believe; that one Waterman and Beaver, on the 6th day of June, 1874, obtained a judgment against said Clark County, in this court, for the sum of four thousand one hundred and twenty-four dollars and costs, and the causes of action on which said judgment was rendered were certain coupons representing the interest on a part of said two hundred thousand dollars in bonds so issued as aforesaid by the County Court of Clark County, to the said Missouri and Mississippi Railroad Company. These defendants deny that said
12 $200,000 in bonds or any part of them were delivered on the first day of June, 1871, and aver that none of the same were delivered before January, 1874, or disposed of before that time; that all of said two hundred thousand dollars in bonds bear eight per cent. per annum; that the said County Court of Clark County had no authority to subscribe for said two thousand shares of the capital stock of the said Missouri and Mississippi Railroad Company, nor to issue bonds therefor, nor to levy a tax to pay the same, except in so far as such power was conferred by the thirteenth section of an act passed by the general assembly of the State of Missouri, entitled "An act to incorporate the Missouri and Mississippi Railroad Company," and approved February 20, 1865; that it was provided in and by the 13th section of said act that it should be lawful for the corporate authorities of any city or town, or the County Court of any county desiring so to do, to subscribe to the capital stock

of said Missouri and Mississippi Railroad Company, and to issue bonds therefor, and levy a tax to pay the same NOT TO EXCEED ONE-TWENTIETH OF ONE PER CENT. upon the assessed value of the taxable property for each year; that these defendants, knowing that said bonds had been fraudulently issued and disposed of, and believing that the holders of the same
13 took the same with notice of such fraud, they, as such County Court, for the year 1874, and their immediate predecessors in office for the year 1873, failed to levy said one-twentieth of one per cent. tax to pay said bonds or the interest coupons thereon; that the taxes of 1873 had already been levied when these defendants were elected to office as said county judges; that the judgment obtained by the plaintiff against said County of Clark mentioned and described in the said alternative writ to which this return is made, was obtained in this court on the 6th day of Juue, 1874, for the sum of eight thousand six hundred and six dollars and sixty-four cents, and costs, and the causes of action on which said judgment was rendered were certain coupons representing the interest on a part of said two hundred thousand dollars in bonds so issued as aforesaid by the County Court of Clark County to the said Missouri and Mississippi Railroad Company; that these defendants have not levied said tax of one-twentieth of one per cent. to pay the judgment of said plaintiff since said judgment was rendered, because they had no power so to do; that it is provided by the laws of Missouri that the County Courts of counties organized under the township-organization acts shall hold four sessions each year, commencing respectively on the third Mondays of January, April, July and November; and it is further provided, that at the April term of said court the County Court shall examine the assessment-rolls of the several townships in
14 their county, for the purpose of equalizing the valuation in the several townships, and also correct the several lists, if necessary, and at said term fix a certain rate to be levied upon the hundred dollars of taxable property, personal and real, in their respective counties, for county purposes, and for township purposes; that the County Clerk shall immediately

thereafter, immediately after said April term of said County Court, cause the taxes to be extended on a fair copy of the assessment lists, and as soon as the same shall have been extended the said County Clerk is required to make out annually, and only annually, for the use of the Township Collector, correct duplicate tax-bills, side by side, in a well-bound book, of all taxes on all property assessed in the townships; that the defendants, as a County Court, have no authority or power to collect any tax, general or special, except from, through and by the assessment and tax-bills made out annually by the County Clerk as aforesaid; that the only time provided by law for levying taxes, general and special, in Clark County, for the years 1871, 1872, 1873 and 1874, was in the summer of each of said respective years, at certain meetings of said County Court, as provided by law; that the only time provided by law for making said levy for the year 1874 was at the April term of said court, beginning on the third Monday of April; and the only time for levying taxes in said Clark County, both general and special, as provided by law, is at said April term, 1875, beginning on the third Monday of April; that the time has passed in which these defendants, as the County Court of Clark County, have any authority to make said levy of said special tax of one-twentieth of one per cent. for said years of 1871, 1872, 1873 and 1874, or to levy any portion of the county tax for the year 1874, authorized to be levied by the laws of this State; that these defendants as said County Court have no authority to levy said special tax of one-twentieth of one per cent. for more than one year at one and the same time, or during or for more than one and the same year; and defendants deny that the County Court was authorized or empowered to levy said tax for each year after the issue of said bonds; that said County Court had no authority to levy said tax until said bonds were disposed of by said county.

"These defendants deny that the said County of Clark is or ever was authorized to levy a tax of one-half per cent. yearly on all the taxable property of said county to pay its

debts and expenses; that, on the contrary, the said county, by its County Court, was for the year 1874 empowered to levy such sums as might be necessary to defray the expenses of said county, by a tax upon all property and licenses made taxable by law for State purposes, except certain exempted property, but the county tax should in no case exceed one-half of one per cent. on all taxable property; and these defendants deny that the County Court of Clark County failed to levy one-half per cent. on the taxable property of said county for the year 1874 to pay the expenses of said county; that for the year 1874 the following rates of tax were levied on all the taxable property in said County of Clark, to-wit:

State revenue.....	20c.	on	each	$100.00	valuation.
" interest	25c.	"	"	"	"
County revenue.....	40c.	"	"	"	"
" poor.....	10c.	"	"	"	"
" bridge.....	05c.	"	"	"	"
For int. on M.I.& N.R.R.b'ds.	10c.	"	"	"	"
" A. & B. R. R....	40c.	"	"	"	"

"That said county tax of one-half per cent. for the year 1874 was fully levied and collected and has been paid out in paying the expenses of the said Clark County; that the only time provided by law for levying said county tax of one-half of one per cent. for the year 1874 was at the meeting of the County Court of said county, held on the third Monday of April, 1874, and that these defendants have no authority to levy any portion or residue of county taxes for the year of 1874 during the year 1875; that it is not the duty of the County Court of Clark County to levy taxes and pay all the indebtedness of said county by the laws of the State of Missouri; that the County Court of Clark County has no authority to levy taxes for county purposes except to the extent of one-half of one per cent. on the taxable property of said county, for the purpose of paying the expenses of said county, and all that said tax can produce is necessary to pay the current expenses of

said Clark County, and have no authority to levy said county taxes to pay the judgment of plaintiff; and these defendants say that they have no authority or power to make any other order or provision than that said special tax of one-twentieth of one per cent. on all the taxable property of Clark County, when collected, shall be applied pro rata to the payment of all the interest coupons on said two hundred thousand dollars in bonds, including the said judgment of plaintiff, Wm. A. Johnston.

"These defendants deny that a demand has been made on said County Court to levy and collect taxes to pay plaintiff's judgment, and defendants deny that they have neglected to levy said taxes; these defendants, as said County Court, say they intend and have always intended since the said judgment in favor of the plaintiff was rendered against Clark County, to levy a tax of one-twentieth of one per cent. on the taxable property of said county, at the April term, 1875, of the County Court of said county, and apply the proceeds thereof, when collected, to the payment pro rata of the judgment in favor of said plaintiff,

and the interest coupons of the remainder of said two
18 hundred thousand dollars in bonds, issued as aforesaid,
to said Missouri and Mississippi Railroad Company; and these defendants, as the County Court of Clark County, state in this their return to the alternative writ issued in this cause, they will annually, beginning at their April term, 1875, of said court, levy said special tax of one-twentieth of one per cent. on all the taxable property of Clark County, and apply the proceeds, when collected, to the payment pro rata of the judgment of the plaintiff, and the judgment in favor of Waterman and Beaver aforesaid, and the interest coupons on the other portion of said two hundred thousand dollars of bonds issued and delivered to the said Missouri and Mississippi Railroad Company in payment of said subscription for two thousand shares of the capital stock of said Railroad Company; and these defendants further state, that the said coupons on which the plaintiff obtained judgment were not disposed of by the aforesaid agent of

the County of Clark until after the third Monday of April, 1873, and until the year 1874, as these defendants have been informed and believe, and the same belonged to the county of Clark until January, 1874.

"Wherefore these defendants pray that the said peremptory writ of mandamus may be denied and these defendants discharged with their costs."

Upon final hearing the Court below ordered the peremptory writ for the 1-20 of one per cent. for the years 1874 and 1875, but refused to order the 1-20 of one per cent. for the years 1872 and 1873, and refused to order a levy in excess of the 1-20 of one per cent.

In the printed record made in this court the judgment erroneously reads as having ordered a levy for the year 1873; it should read instead 1874.

The plaintiff in error insists in this court:

1st. The peremptory writ should have ordered the levy of 1-20 of one per cent. for the years 1872 and 1873.

2nd. The writ should have ordered a levy of one mill in excess of 1-20 of one per cent.

We will consider the propositions in their inverse order:

BRIEF.

I.

The County Court is expressly restricted from levying more than one-twentieth of one per cent. in any one year to pay the bonds and coupons in controversy.

These bonds and coupons were issued by virtue of the power conferred upon the County Court by section 13 of the act of General Assembly of Missouri entitled "An Act to incorporate the Missouri and Mississippi Railroad Company," approved February 20th, 1865 (Session Acts 1865, page 88) which reads as follows:

"§ 13. It shall be lawful for the corporate authorities of any city or town, the County Court of any county desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor and levy a tax to pay same, not to exceed one-twentieth of one per cent upon the assessed value of taxable property for each year."

This was the only authority under which the bonds could have been issued.

The subscription for which the bonds were issued was made without a vote of the people, and were it not for the authority contained in the charter of the railroad company these bonds would be absolutely void.

The amended alternative writ alleges they were issued pursuant to the power contained in the charter, the bonds so recite on their face—and the return so alleges, and further alleges that this was the only authority for the issue of the bonds. All of which is admitted.

The Constitution of Missouri adopted July 4th, 1865 (Sec. 14, Art. XI) prohibits the Legislature from authorizing any county, city or town to subscribe to the stock of a railroad company without the assent of two-thirds of the qualified voters.

That the provision in the charter was all that saved the bonds from being declared absolutely void, See

State vs. Macon County Court, 41 Mo., 453.

State vs. Sullivan County Court, 51 Mo., 522.

Smith & Hall vs. Clark County, 54 Mo., 58.

That the bonds would have been absolutely void without two-thirds vote in the absence of special charter, See

Carpenter vs. Lathrop, 51 Mo., 483.

Township of East Oakland vs. Skinner, 4 Otto, 257-8.

The charter of the Company being the power and only power from which these bonds derive their validity, it is certainly true that the charter and the bonds issued thereunder constitute a contract be-

tween the county and the bondholders, and both are bound by it.

Von Hoffman vs. Quincy,4 Wall., 553.

What was the contract between the bondholders and the county?

Simply this and nothing more:

The county issued the bonds with the understanding and agreement on the part of the bondholders that it could not and should not levy more than one-twentieth of one per cent. tax each year to pay them.

The power of a county to levy a tax must be derived from the Legislature, and of course the power cannot be extended beyond the limitation imposed by the Legislature.

That the County Court cannot directly or indirectly levy more than one-twentieth of one per cent. under this charter is clearly determined by two leading cases—one in the Supreme Court of the United States and the other in the Supreme Court of Missouri.

Carroll County vs. United States, 18 Wall., 71.

State ex. rel. Aull vs Macon County Justices, 56 Mo, 156.

The Carroll County case settles beyond question that the obtaining of judgment does not strengthen or change, or enlarge the power of taxation con-

ferred by law, and that the United States Courts should follow the Supreme Court of the State in the construction of a State statute upon this kind of a question.

The Macon County case is an authoritative construction of the same section of the same charter under which the bonds in controversy were issued, and is conclusive that but one-twentieth of one per cent. can be levied in any one year.

In this case the Supreme Court of Missouri held that the limitation of one-twentieth of one per cent. was a restriction upon the County Court, and that the limitation applied to bonds and coupons alike. The counsel for plaintiff in error do not understand the full scope of the decision if they think the Court only decided that the limitation applied to the principal of the bonds.

The proceeding was to compel the levy of a tax to pay the bonds and coupons, This is repeatedly stated in the opinion of the Court. The decision was that the limitation applied to principal and interest. The section of the charter is so clear and unambiguous as to leave no room for a different construction.

The counsel for plaintiff in error, in their brief, seem to labor under the impression that the power of the county to levy a tax has been enlarged by legislation since the granting of the charter of the railroad to whom the bonds were issued. In this

they are entirely mistaken. They rely on sections 18 and 21 (1st Wagner, pages 305 and 306, ed. 1872). These sections are not new enactments but simply old laws continued in force. They were in force and precisely the same at the passage of the charter and at the issuance of the bonds in question.

See 1st Revised Statutes 1855, section 31 (as amended by laws of 1860, sec. 2 session acts, page 88) and sec. 33, pages 427 and 429.

And General Statutes of 1865, sections 18 and 21, pages 338 and 339.

The Revised Statutes took effect in 1855. The General Statutes took effect August 1st, 1866.

The General Statutes of 1865, sec. 5, chapter 224, page 883, provides—

"The provision of the General Statutes so far as they are the same as those of existing laws shall be construed as a continuation of such laws and not as new enactments."

The same provision precisely is in 2d Wagner, ed. 1872, sec. 5, page 897.

The counsel for plaintiff are again mistaken as to what Wagner's Statutes are. They are not a revision of the laws of Missouri. Judge Wagner, when upon the Supreme bench of the State prepared these statutes without legislative authority. Afterwards the Legislature of Missouri passed an

act, March 16th, 1870, purchasing certain volumes of the work for the use of the State officers, and in section 5 provided that the statutes should be *prima facie* evidence of the statute law of the State.

The Revised Statutes of 1855 (sec. 35, 1st vol., page 429) and the General Statutes of 1865 (sec. 22, page 339) authorized mandamus to County Courts.

By act of March 24th, 1870, said section 22 of General Statutes was amended so as to extend to City Councils and Town Trustees. Said section 22 as amended is found in sec. 22, page 306, 1st Wagner, ed. 1872.

So it will be seen that sections 18, 21 and 22, 1st Wagner, pages 305—306, edition of 1872, so far as they relate to County Courts, were each and all in force at the time of the passage of the charter and the issuance of the bonds in question. And the word heretofore in section 21 means prior to 1855, when the section took effect.

The express purpose of section 13 of the charter of the company in restricting the power of the County Court to one-twentieth of one per cent. in any one year was to prevent the foregoing laws from applying to subscriptions to this company.

The power given to the courts to levy for ordinary county expenses at the adoption of the charter is found in 1st Revised Statutes, sec. 1, page 134

(as amended by act of 1864, sec. 1, page 84) and at issuance of bonds is found in sec. 76 General Statutes 1865, page 121.

This power to levy for ordinary county expenses by act of March 30, 1872 (See 2d Wagner, ed. 1872, sec. 165, page 1193) was restricted to one-half of one per centum.

No one has ever claimed (unless the alternative writ in this case claims it) that this authority authorized a levy to pay for railroad subscriptions. The counsel for plaintiff in error does not assert such a claim in his argument.

But if this authority conferred the power to levy for railroad purposes it was in force at the adoption of the charter and the issuance of the bonds and the restriction to one-twentieth of one per cent, was for the express purpose of excluding its exercise to pay a subscription to this company.

We dispose of the act of March 10th, 1871 (sec. 52, page 313, 2d Wagner, ed. 1872) referred to by counsel for plaintiff, by calling the attention of the Court to the fact that that law has no reference whatever to county subscriptions, but only to township subscriptions.

See 1st Wagner, sections 51, 52, 53 and 54 pages 313.

The Constitutional provision, sec. 6, art. 9, new Constitution 1875, preserves the right to the county to use such means as are or may be prescribed by law to pay existing indebtedness.

It does not enlarge existing powers nor does it limit them.

The conclusion to be derived from a review of the law of Missouri is that there is no authority to levy a tax to pay these bonds and coupons except that contained in the charter. The charter expressly restricted the taxing power to pay these bonds to one-twentieth of one per cent. This power has not been enlarged by any subsequent legislation.

There is no subsequent legislation giving any power to County Courts.

Even if there was, and such legislation was in general terms this court could not under the well recognized canons of construction say that the restriction in the charter had been repealed. Repeals by implication are not favored.

A general grant of powers is not inconsistent with a special restriction.

In this case even if sections 18, 21 and 22, 1st Wagner, ed. 1872, pages 305-6 had been passed since the adoption of the charter and the issuance of the bonds (which is not the fact as we have shown), they could not be held to repeal the restriction contained in the charter.

As we have shown the charter of the railroad company giving the authority to issue the bonds in question has received an authoritative construction in the Macon County case *ante*—

This Court will adopt that construction.

Township of East Oakland vs. Skinner, 94 U. S. 257.

Township of Elmwood vs. Marcy, 92 U. S. 257.

Carroll County case, 18 Wallace *ante*.

II.

The Court below could not compel the County Court to levy the one-twentieth of one per cent. for the years 1872 and 1873.

In 1872 and 1873 the bonds had not been issued. They were fraudulently issued after that time in 1874.

The charter imposed no duty upon the County Court to levy the tax until the bonds were outstanding.

There was no obligation upon the Justices of the County Court in office during those years to levy the tax. The Justices for those years were different individuals from the respondents. They were not requested to levy the tax.

Had they levied the tax before the bonds were outstanding such a levy would have been void.

Another conclusive reason against compelling the levy of the tax for those years was that the Cir-

cuit Court had no power to compel the levy until judgment was rendered.

The jurisdiction to order a mandamus had its origin with the rendition of the judgment.

The Circuit Court had no jurisdiction except by virtue of the judgment.

The United States Courts have no original jurisdiction in mandamus cases.

Bath County vs. Amy, 13 Wallace 244.

Riggs vs. Johnson Co., 6th Wallace 166-197.

The Circuit Court could only order a mandamus for the neglect of the County Court to pay the judgment. They had no authority to order a mandamus for any neglect prior to the rendition of the judgment.

The judgment having been obtained in 1874 it became the duty of the County Court to levy for that year and apply the *pro rata* proportion of the tax to the payment of the judgment.

Having failed to do this a mandamus could be issued from the Circuit Court.

The order of the Court directs the Justices to proceed and levy for 1874 and 1875 and for subsequent years. This they are doing and will continue to do until the judgment of plaintiff is satisfied.

The order is as favorable as plaintiff could ask.

There is no case within our knowledge that would authorize this Court to order the mandamus reaching back to 1872 and 1873, before judgment was rendered and before the bonds were outstanding.

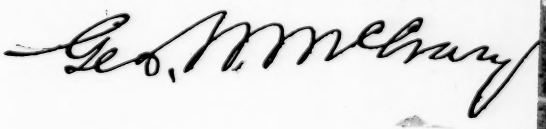
The learned counsel for the plaintiff have not referred to any such case.

We feel confident no such case can be found.

III.

We respectfully submit that the judgment of the Circuit Court should be affirmed.

McCRARY, HAGERMAN & McCRARY,
Attorneys for Clark County.



SUPREME COURT OF UNITED STATES.

No. 102.

THE UNITED STATES, *ex rel* WM. A. JOHNSTON,
Plaintiff in Error,

vs.

THE COUNTY COURT OF CLARK COUNTY AND THE JUSTICES THEREOF,
Defendants in error.

In error to the Circuit Court of the United States, for the Eastern District of Missouri.

BRIEF OF

JAMES O. BROADHEAD,

FOR DEFENDANTS IN ERROR.

SUPREME COURT OF THE UNITED STATES.

No. 102.

THE UNITED STATES, *ex rel* WM. A. JOHNSTON,

Plaintiff in Error,

vs.

THE COUNTY COURT OF CLARK COUNTY AND THE JUSTICES THEREOF,

Defendants in error.

In error to the Circuit Court of the United States, for the Eastern District of Missouri.

STATEMENT ON BEHALF OF DEFENDANTS IN ERROR.

The relator on the 24th of Sept., 1874, filed a petition for mandamus, against the County Court of Clark county, Missouri, and the Justices thereof, in the Circuit Court of the United States within and for the Eastern District of Missouri. An amended alternative writ of mandamus was filed on the 5th day of April, 1875, in which it was alleged, on information filed:

1st. That Wm. A. Johnston had obtained a judgment on June 6th, 1874, against Clark county, Missouri, for $8,606.64,

on four installments of interest on one hundred bonds of said Clark county for $500 each.

2nd. That said bonds were executed and delivered by said county on June 1st, 1871, by order of the County Court of Clark county under and by authority of the charter of the Missouri and Mississippi Railroad Company.

3d. That, by section thirteen of said act the said County Court was authorized and empowered *to levy a tax of one-twentieth of one per cent. upon the assessed value of taxable property for each year after the issue of said bonds.*

4th. That by the laws of the State of Missouri it was the duty of the County Court of Clark county to levy taxes and pay all the indebtedness of said county; and that, in addition to the said one-twentieth of one per cent. the said county *was authorized to levy a tax of one half of one per cent. yearly*, on the taxable property of the county, to pay the *debts* and expenses of said county.

5th. That the valuation of taxable property in said county was not less than $3,740.00.

6th. That said County Court *for the year* 1874, had levied a tax *for county purposes* of only *four mills on the dollar*, leaving one mill which they were authorized to levy, not levied.

7th. That said County Court did not levy the tax of one-twentieth of one per cent. nor any other sum, for the years 1872, 1873 and 1874, to pay said bonds for which said judgment was rendered.

8th. That the tax of $\frac{1}{20}$ of one per cent. would not raise over $1,500 or $2,000 a year, while the whole amount of bonds issued was $200,000, and required a tax amounting to $16,000.

9th. That a tax of one mill on the dollar, of the valuation,

will not exceed $3,750, and the same is not sufficient with the $\frac{1}{20}$ of one per cent. to pay the Johnston judgment in one year.

10th. That execution had been issued on said judgment and was returned "no property found;" and a demand had been made on said County Court to levy and collect taxes to pay said judgment, and said officers had neglected to levy and collect said taxes, and petitioner is without adequate remedy at law. Wherefore, the said County Court and the said parties thereof were commanded by said alternative writ to levy and collect a tax of one-twentieth of one per cent. for the years of 1872, 1873 and 1874, and each of the following years, and apply a *pro rata* share thereof on the plaintiff's judgment, and to levy the residue of said five mill tax for the year 1874 and each succeeding year, and collect said taxes and apply the same yearly on the plaintiff's judgment, and to levy the residue of said five-mill tax for the year 1874 *and each succeeding year*, and collect said taxes and apply the same yearly on plaintiff's judgment, until interest at the rate of seven per cent. and costs are paid and satisfied in full, or that you appear and show cause on 3d Monday of March why you refuse to do so.

RETURN TO AMENDED ALTERNATIVE WRIT.

1. The defendants alleged that Clark county, in the year 1872, adopted, what is termed in the laws of Missouri, "Township Organization," and that said county, from that time, had been governed by the laws of Missouri pertaining to township organization.

2. That the County Court of Clark county, on May 3, 1871, executed $200,000 in bonds of said county to pay for 2000 shares of stock for which the County Court had that day subscribed in the Missouri and Mississippi Railroad Company; and

placed said bonds in *the hands of an agent to be paid over to said Missouri and Mississippi Railroad Company*, from time to time as the work of the said road progressed through said county.

3. That all of said bonds had been fraudulently disposed of by said agent, and all remained unpaid, with the coupons thereon; that a judgment for $4,124 had been rendered in this Court against Clark county on coupons of part of said bonds in favor of Waterman & Beaver, on June 6th, 1874.

4. Deny that said $200,000 of bonds, or any part of them were delivered *on the first day of June*, 1871, *and aver that none of the same were delivered before January*, 1874, *or disposed of before that time; and that the same belonged to the County of Clark until January*, 1874.

5. That the County Court of Clark county had no authority to subscribe for said 2,000 shares of the capital stock of said Missouri and Mississippi Railroad Company, nor to issue bonds therefor, nor to levy a tax to pay the same, except in so far as such power was conferred by the thirteenth section of an act passed by the General Assembly of the State of Missouri, entitled "An act to incorporate the Missouri and Mississippi Railroad Company," approved Feb. 20, 1865; that it was provided in and by the 13th section of said act that it should be lawful for the corporate authorities of any city or town, or the *County Court of any county desiring so to do, to subscribe to the capital stock of said Missouri and Mississsppi Railroad Company, and to issue bonds therefor, and levy a tax to pay the same not to exceed one-twentieth of one per cent. upon the assessed valuation of the taxable property for each year.*

6. That the taxes of 1873 had been levied before the present Justices of the County Court had been elected; that, knowing all

of said $200,000 bonds had been fraudulently issued and disposed of, and believing that the holders thereof took the same with notice of the frauds, the defendants refused to levy the tax of one-twentieth of one per cent. for the year 1874, and judgments on said coupons were not rendered until June, 1874; and, by the laws of Missouri, the County Court was authorized to levy taxes *only* in the month of April of each year, and had no authority to levy said special tax of one-twentieth of one per cent. for more than *one year at one and the same time*, or during or for more than one and the same year, and *had no authority to levy said tax until said bonds were sold.*

7. Deny that Clark county was authorized to levy a tax of one-half per cent yearly on all the taxable property of said county to pay its *debts* and expenses and ~~even~~ air that said county, by its County Court, for the year 1874, was empowered to levy such sums as might be necessary to defray the *expenses* of said county, but the county tax should in no case exceed one-half of one per cent. on all taxable property, and deny that they failed to levy said tax of one-half of one per cent. for the year 1874, and then set out all the taxes levied for 1874, making the total taxes for "county revenue," "county poor," and "county bridges," fifty-five cents on the $100.

8. That the County Court of Clark county had no authority to levy taxes for county purposes except to the extent of one-half of one per cent. on the taxable property of said county for the purpose of *paying the expenses of said county, and that all said tax can produce is necessary to pay the current expenses of said Clark county*, and that the said County Court had no authority to levy said county taxes to pay the judgment of plaintiff.

9. That defendants had no authority or power to make any

other order or provision than that said special tax of one-twentieth of one per cent. on all the taxable property of Clark county, when collected, should be applied *pro rata* to the payment of all the interest coupons on said two hundred thousand dollars in bonds, including the said judgment of plaintiff, Wm. A. Johnston.

DEMURRER TO RETURN.

The relator demurred to the Return, and for ground of said demurrer, said:

1. That said return does not state facts sufficient to constitute any excuse for disobedience of the said alternative writ, or to show why said alternative writ ought not to have been issued, or to show obedience to said writ.

2. That several separate and distinct answers or defences to the allegations of the said amended writ are confusedly joined in one count of the return and not set forth distinctly, separately and intelligibly in separate counts.

3. That said return contains several inconsistent defences, some by way of traverse and some by way of confession and avoidance of the allegations of the writ.

The Court overruled the demurrer. *The return was not traversed.* The cause was submitted on the amended writ and return, (see p. 11, printed record, near the bottom,) whereupon the Court ordered that a peremptory writ of mandamus be issued against the defendants, commanding them to cause a tax levy to be made for the year 1874, (by mistake, in printed record, the year is stated to be 1873, see page 11,—but the bill of exceptions, on page 12, states the year correctly,) on the assessment of that

year, to the extent of $\frac{1}{20}$ of one per cent., and for the year 1875, on the assessment of the latter year at the same rate of $\frac{1}{20}$ of one per cent.; the proceeds thereof to be applied, *pro rata*, to the amount of the judgment in this case and in other cases, on coupons of bonds of same issue, and also to interest on the other bonds of the same issue; and that respondents cause to be levied from year to year the same per cent., on assessed values, until the *pro rata* portion thereof, applicable to the judgment, interest and costs in this case, shall be paid.

BILL OF EXCEPTIONS.

The Court refused to order a peremptory mandamus requiring the respondents to levy and collect a tax of one-twentieth of one per cent., as prayed by the relator, for the years 1872 and 1873, but ordered such tax for the years 1874 and 1875 only; [and succeeding years] and also wholly refused to order the levy of the taxes prayed by the relator, in excess of one-twentieth of one per cent., to which decision and opinion of the Court the plaintiff, by its counsel, at the time duly excepted. No exception was taken to the overruling of the demurrer.

And the plaintiff brings the case here by writ of error.

It is alleged in the writ, and admitted in the return, that the relator's judgment was recovered on interest coupons on bonds that were issued by the County Court of Clark county, under the 13th section of an act entitled "An act to incorporate the Missouri and Mississippi Railroad Company," approved February 20th, 1865, (laws of Missouri, 1865, p. 86 Sess. Acts,) which is as follows:

"§ 12. It shall be lawful for the corporate authorities of any city or town, the County Court of any county desiring so to do,

to subscribe to the capital stock of said company, and may issue bonds therefor, and levy a tax to pay the same, not to exceed one-twentieth of one per cent. upon the assessed value of taxable property for each year."

As to the powers of a County Court, under township organization, these sections of the law are quoted:

Laws of Mo., 1873, p. 94, Art. 14, Sec. 2, (p. 116.)

"Sec. 2. No county under this act shall possess or exercise any corporate powers, except such as are enumerated in this act, or shall be specially given by law, or shall be necessary to the exercise of the powers so enumerated or given."

Art. 15, (act last referred to) Secs. 13 and 17, (p. 118, Laws Missouri, 1873.)

"Sec. 15. The County Courts in each county in this State, organized under this act, at the April Term of said Court, shall examine the assessment rolls of the several townships in this county, for the purpose of equalizing the valuation in the several townships, and also correct the several lists, if necessary. *They shall also fix a certain rate, to be levied upon the hundred dollars of taxable property, personal and real, in their respective counties, for county purposes* which they shall cause to be entered upon their records, and they shall, at the same time, also enter upon their records the amount to be collected in each township for township purposes.

"Sec. 17. As soon as the taxes are extended on said copy, the clerk of the County Court shall make out *annually*, for the use of the township collector, correct duplicate tax bills," etc.

As to the power of the County Court to levy taxes and the limitations thereon, the law is as follows: (See Laws of Mo., 1872, page 80—See page 85, Sections 7 and 161, Act concerning Revenue.)

"Sec. 7. There shall be annually levied, assessed and collected on the assessed value of all the real estate and personal property subject by law to taxation in this State, one-fourth of one per centum for State revenue, *and one-fourth of one per centum for the payment of all State indebtedness.*

(P. 116). "Sec. 166. The several County Courts are empowered *to levy such sums as may be annually necessary to defray the expenses of their respective counties*, by a tax upon all property and licenses made taxable by law for State purposes, except what is herein excepted by this act, *but the county tax shall in no case exceed one-half of one per cent. on all taxable property;* and, on all licenses made taxable by law, the county tax shall not exceed the State revenue tax more than one hundred per centum for the same time."

The new Constitution of Missouri went into force July 4th, 1865. Section 14 of Art. II. of that Constitution is as follows: (See Wagner's Statutes, 1 vol., p. 62.)

"XIV. The General Assembly shall not authorize any county, city or town to become a stockholder in, or loan its credit to any company, association *or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto.*"

The assent of the qualified voters of Clark county was not asked to the said subscription of $200,000 to the Missouri and

Mississippi Railroad Company. All the authority the County Court had to make said subscription and to issue said bonds was under and by virtue of the 13th section of the charter of the Missouri and Mississippi Railroad Company, quoted above.

The cause was submitted on the return. The Missouri Statute on the subject of pleading to the return, is as follows: (2 Wag. Stat., p. 924, § 2, ch. 9, concerning Mandamus.(

"§ 2. When any writ of *mandamus* shall be issued, and return shall be made thereto, the person suing or prosecuting such writ shall plead to or traverse all or any of the material facts contained in such return."

This allegation is made in the return (p. 7, Printed Record):

"These defendants deny that said $200,000 in bonds, or any part of them, were delivered on the first day of June, 1871, and aver that none of the same were delivered before January, 1874, or disposed (of) before that time * * (p. 9), and that the same belonged to the county of Clark until January, 1874."

Also, this (p. 9, Printed Record):

"That said county tax of one-half per cent. for the year 1874, was fully levied and collected, and has been paid out in paying the expenses of Clark County; * * that the County Court of Clark County has no authority to levy taxes for county purposes except to the extent of one-half of one per cent. on the taxable property of said county, for the purpose of paying the expenses of said county, *and all that said tax can produce is necessary to pay the current expenses of said Clark county.*"

By the laws of Missouri (See Laws of Missouri, 1872, p. 180, Session Acts), counties were permitted to adopt township organizations. Clark county adopted it in 1872. The law in regard to township organization was amended in 1873, and all former laws were thereby repealed. (See Laws of Mo., 1873, p. 94.)

The questions to be decided by this Court are whether, upon the return, the Circuit Court should have ordered the respondents to levy the tax of one-twentieth of one per cent. for the years 1872 and 1873, and a tax of one mill for the year 1874 and subsequent years.

BRIEF.

I. The County Court of Clark county had no power to levy, in one year, a tax of more than one-twentieth of one per cent. upon the assessed value of the taxable property in the county, to pay the $200,000 bonds and interest thereon, issued to the Missouri and Mississippi Railroad Company.

State *ex rel.* vs. Shortridge, 56 Mo., 126.

Supervisors vs. United States. 18 Wallace, 71.

The 13th section of the act chartering the Missouri and Mississippi Railroad Company has been construed by the Supreme Court of Missouri in reference to the very points in controversy in this case.

We submit that the case of the State *ex rel.* Shortridge (56 Mo., 126) conclusively settles the question that no other tax can be levied to pay these bonds and the interest coupons thereon than that provided in the above 13th section of the charter of the Missouri and Mississippi Railroad Company. In that case a mandamus was asked to compel the County Court of Macon county (Missouri) to levy a tax to pay the principal and interest of several railroad bonds, held by the relators as purchasers

thereof for value before maturity, which bonds had been issued by Macon County under the said 13th section of the act to incorporate the Missouri and Mississippi Railroad Company. (The bonds had been originally issued under a mandamus to the County Court of Macon county.) The bonds amounted to $175,000, and were past due. The one-twentieth of one per cent. tax, during the five years the bonds had run, had paid the interest and had created a surplus of $12,500, and that was all the funds the county had with which to pay the $175,000. The suit was to compel the County Court to levy taxes beyond the one-twentieth of one per cent. to pay the bonds. The Court refused the mandamus. In its opinion the Court says (p. 129):

"The point for us to consider is whether the County Court of Macon county is prohibited by section thirteen of the charter of the railroad company, above quoted, from levying, in any one year, a tax of more than one-twentieth of one per cent. upon the assessed value of the taxable property in the county. There seems to be no restriction on the power of the county as to the amount of stock to be subscribed or the amount of bonds to be issued in payment of such subscription. Prudence, indeed, would dictate that the County Court, in the exercise of its discretion, ought not to have subscribed any more stock or issued bonds to any greater amount than they had authority to raise funds by taxation to meet the annual interest on the bonds, and the principal when they matured. But this, in my judgment, was a matter of discretion, and an excessive issue beyond the means of payment, of itself does not render the bonds void.

"Section thirteen of the charter above referred to, entered into and formed a part of the bonds themselves, and these bonds

must receive the same construction as though this section had been set out in *hæc verba* on their face.

"There can be no innocent holder so far as the restriction upon the power of taxation is concerned. Each bondholder takes it subject to this restriction, and he must ascertain for himself whether there has been an over issue. The records of the County Court will show the amount used, and he can examine for himself as to the amount of taxable property in the county. The language of section thirteen is plain and positive and will hardly admit of any other than a literal construction. It reads that the County Court 'may issue bonds therefor, and levy a tax to pay the same, not to exceed one-twentieth of one per cent. upon the assessed value of the taxable property for each year.' A county is a mere *quasi* corporation, having only such powers as are delegated to it by the Legislature. The County Court is the administrative agent of the county, and can only exercise such powers as are conferred on it by Statute. * * * * * * (p. 130) But the very law authorizing the issue of the bonds in question, also limits the power of the County Court to levy a tax beyond one-twentieth of one per cent. for their payment, in any one year. This limitation was enacted not for the bondholders, but for the benefit of the taxpayers, so that they might not be harassed with a railroad tax, in any one year, too grievous to be borne. The Board of Supervisors of Carroll County vs. The United States ex rel. Reynolds, (18 Wallace, 71,) was a case taken by writ of error from the Circuit Court of the United States for the district of Iowa. That case is very analagous to the one under review, and fully maintains the doctrines of this opinion. It is true two of the judges dissented, but not on the point involved in the case."

In the case of the Supervisors vs. United States, (18 Wallace, 71,) referred to above, the relator had obtained judgment against Carroll county for $9,946, on warrants issued for the ordinary expenditures of the county. The supervisors had authority to levy not more than four mills on the dollar for ordinary county revenue. The relator's execution having been returned *nulla bona*, he applied for a mandamus to compel the board to levy a sufficient tax to pay the debt. To the writ the board returned that they had levied a tax of four mills, and proposed to do so every year until relator's judgment was paid, and they added that they had no power to levy a higher rate.

Justice Strong, in delivering the opinion of the Court, reversing the judgment below, and holding the "return" sufficient, said, (p. 77):

> "It is very plain that a mandamus will not be awarded to compel county officers of a State to do any act which they are not authorized to do by the laws of the State from which they derive their powers. * * * * * * Is it, then, the duty of the board * * * to levy a special tax in addition to a county tax of four mills on the dollar, to satisfy a judgment recovered against the county for ordinary indebtedness?"

After commenting upon the Iowa statutes, the Court says that they have been construed by the State Court, and adds:

> "That the construction of the statutes of a State by its highest courts is to be regarded as determining their meaning, and generally as binding upon United States Courts. It has been asserted by us too often to admit of debate, * * * and we adopt the construction of a State statute settled in the

courts of the State, though it may not accord with our opinion * * * * (p. 83.) * * * * The holders of the warrants were therefore informed when they took them that by the laws of the State no special tax could be levied for their payment."

II. If the County Court of Clark county had the power to levy any *unlevied* portion of the one-half of one per cent. tax, authorized to be levied for county purposes, and apply the same to the the payment of relator's judgment, still, with defendant's return not traversed, no peremptory *mandamus* could be ordered, because it does not appear to the Court that any portion of said tax of one-half of one per cent. was unlevied for the year 1874, or that the whole thereof, for subsequent years, would not be required to pay county expenses.

The defendants, in their return, on that point allege as follows (p. 9, Printed Record):

"That said county tax of one-half per cent., for the year 1874, *was fully levied* and collected, and has been paid out in paying the expenses of the said Clark county, * * *and all that said tax can produce is necessary to pay the current expenses of said Clark county.*"

As far as any presumption or intendment is exercised in construing a return, it should be in favor of, and not against its sufficiency.

High on Extraordinary Legal Remedies, § 461.

And, where the relator fails to traverse any of the allegations of the return, they are to be taken as true for the purposes of the application for a peremptory mandamus.

High on Extraordinary Legal Remedies, § 462.

III. The Court was right in refusing to order the special tax of one-twentieth of one per cent., to be levied for the years 1872 and 1873.

The County Court certainly had no authority to levy this tax of one-twentieth of one per cent., to pay the interest on the bonds, before the bonds were delivered. There was no indebtedness, nor any validity in the bonds, until the bonds were delivered.

Delivery is necessary to the *complete execution* of a note.

Carter v. McClintock, 29 Mo. Rep., 464.

And so a note signed on Sunday and *not delivered* until a subsequent day, is valid.

Fritsch v. Heislen, 40 Mo. Rep., 555.

The defendants aver in their return (p. 7, Printed Record), that none of said bonds were delivered before January, 1874, or were disposed of before that time. This not being traversed, is taken as true. (High on Extraordinary Legal Remedies, § 462). So that the Court very properly refused to order the special tax to be levied for the years 1872 and 1873.

JAS. O. BROADHEAD,

Att'y for Defendants in Error.